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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 147

JOHN J. MUTH,
Petitioner-Appellant below,
vs.

AETNA OIL COMPANY, JOHNSTON DRILLING COMPANY, INC., FRED J. KECK, IDA F. KECK, ARTHUR OETH, ROBERT OETH, JAMES A. BOLAND, OLLIE HUSK,
Respondents-Appellees below.

REPLY TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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REPLY TO RESPONDENTS' ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, The Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. On page 2 of respondents' answer it is said that the terms of the partnership agreement of October 6, 1947 between the defendants Oeth and plaintiff Muth were known only to the parties to it, and defendants Johnston Drilling Co., Inc., Aetna Oil Co., and Ollie Husk had neither actual nor constructive knowledge of said agreement; that said defendants had no knowledge of the former partnership relation existing between the Oeths and Muth.

We believe the uncontradicted record is clearly contrary to these statements.

In Finding 6, page 463 of the record, the court found:

> "6. That at the time of the execution of the said oil and gas lease of December 22, 1947, the plaintiff, John J. Muth, and the said defendants, Arthur Oeth and Robert Oeth, *were partners and known to the lessor, Fred J. Keck, to be partners in the business of taking oil and gas leases in the said respective joint interests and for the purpose of drilling for gas and oil in Vanderburgh County and vicinity.*" (Emphasis added.)

The lease of December 22, 1947 from Kecks to Oeths and Muth recited that it

> "was made in favor of Arthur Oeth and Robert Oeth (owners of one-half interest) and John J. Muth, Sr. (one-half interest)". (Lease, R. 29, Finding 5, R. 463.)

Such lease was found by the court to have been duly recorded on February 6, 1948 in the lease records of Vanderburgh County, Indiana. (Court's findings of fact, R. 492, 493.)

Defendant Ollie Husk, who was agent for Johnston Drilling Co., Inc., testified that he knew of the lease of December 22, 1947, of Muth and Oeths from Kecks; he went to the court house and read it and knew of its provisions; that was right after he saw Mr. Keck the first time, which was possibly ten or fifteen days before he got a lease from Keck; he knew that Muth and Oeth were required to start drilling by a certain date, as Keck had promised to give the lease to him after the date it expired. (R. 262.)

On June 2, 1948 the defendant, Aetna Oil Co., took its assignment from the defendant, Johnston Drilling Co., Inc., of an undivided one-half interest in its lease from Keck dated March 27, 1948; at that time Muth had a suit pend-

ing in the Vanderburgh Probate Court, which had been filed on April 8, 1948, against Fred J. Keck, Ida F. Keck, Arthur Oeth, Robert Oeth, Johnston Drilling Co., Inc., and Ollie Husk (Finding 22, R. 471); the complaint in said action, as amended, set up as Exhibit 1 the oil and gas lease of December 22, 1947, as executed by Fred J. Keck and Ida F. Keck, his wife, to Oeths and Muth, as being the subject of the suit and alleged that Keck entered into a combination and conspiracy with the defendants Oeth, Husk and Johnston Drilling Co., Inc., in violation of the rights of plaintiff and acting in wrongful conspiracy and combination with the defendant, Fred J. Keck, to execute another pretended lease on the said 67.5 acres of his land, all for the purpose and with the intent of destroying the right and title of the plaintiff, John J. Muth, in the premises, and to hinder and delay the carrying out of their part of the lease agreement of December 22, 1947. (Finding 20, R. 469, 470.)

Said complaint alleged and set out the partnership agreement of October 6, 1947, by and between John J. Muth and the defendants, Robert Oeth and Arthur Oeth, and charged the dissolution of said partnership on the notice of Arthur Oeth to said John J. Muth and with the wrongful and illegal purpose of preventing Muth from beginning a drilling operation on the Keck premises on or before the 22nd day of March, 1948. (Finding 20, R. 469, 470.)

Attorney Joe Vol Butt appeared in said action as counsel for the defendants, Kecks and Ollie Husk. (Finding 20, R. 470.) He was employed by the Johnston Drilling Co., Inc. to pass on its leasehold interest in its lease with Keck on March 27, 1948; he was also employed by the Aetna Oil Co. to pass on the title to said leasehold of the Johnston Drilling Co., Inc., prior to the execution of the assignment to Aetna by Johnston on June 2, 1948

(Finding 24, R. 472); he was employed by Husk and Keck to prepare the written notice of March 23, 1948, signed by Keck, which commanded Muth and Boland to leave the Keck premises (Plaintiff's Exhibit K, R. 448; Finding 19, R. 467, 468); he was employed by Arthur Oeth, Ollie Husk and Johnston Drilling Co., Inc., to prepare the indemnity agreement dated March 27, 1948, given by said defendants to Mr. and Mrs. Keck representing that all prior leases on the Keck farm had expired, and agreeing that in the event any claim is made against you by any former lessee, we agree to defend such action and to protect you against whatever claims are asserted by former lessees. (Plaintiff's Exhibit X, R. 457; R. 468.)

The court concluded its Finding 24, R. 472, as follows:

> "That by reason of having represented all of the defendants to the present suit in some capacity in connection with the matter of the lease for gas and oil on the 67.5 acres of defendant, Keck, said attorney (Butt) for the various parties was fully aware and apprised of all the matters and things connected with the said title and said litigation and the knowledge of such attorney is imputed to the defendants, Johnston Drilling Co., Inc. and Aetna Oil Company, and was the knowledge of said companies at the time they acquired their respective interests in the premises."

2. The paragraph at the top of page 3 of respondents' brief states that the so-called "top lease" was actually an "exhibit lease" prepared from memory on substantially the same form as the original Keck lease, "to exhibit as a lease similar to Kecks' ". Respondents cite page 126 of the record to support their statement. Page 126 of the record is where Arthur Oeth testified that he showed Miss Mesker the lease to him signed by Keck and "told her this is a lease on Keck * * *; she wanted a lease like Keck

and I gave it to her". (R. 126.) On page 115 of the record Arthur Oeth testified that he took his boy, who could typewrite, over to Kecks and he typed the copy of the lease of December 22, 1947; "it was a copy * * * my boy copied the lease off the same date the other lease". (R. 117.) The court found that the "top lease" was "an exact copy of the lease of December 22, 1947, with the exception that the time was extended thirty or sixty days" (Finding 12, R. 465), and it was in Arthur Oeth's name alone. (Arthur Oeth, R. 149.) Arthur Oeth had the top lease dated back to December 22 to show Miss Mesker that Muth's name wasn't on it, that it was to Oeth individually, for the purpose of getting her to sign a lease to Oeth. (Arthur Oeth, R. 149.)

Respondents state on page 3 of their brief that such exhibit lease was used only in an attempt to gain additional leasehold acreage to induce development and preserve the lease of December 22, 1947, for plaintiff as well as Oeths; Finding 12, R. 465 is cited to support this statement. This finding does not support respondents' statement. The finding is that "the sole purpose of the defendant Arthur Oeth, *in obtaining* said 'top lease' was in an attempt to obtain the Mesker and other adjoining leases" (Emphasis added) (Finding 12, R. 465); this is not a finding that said top lease "was used only in an attempt to gain additional acreage". It *was used* by Arthur Oeth to deceive Miss Mesker. (R. 149.) It was used by Arthur Oeth prior to March 22, 1948 for the wrongful purpose of preventing prospective investors from purchasing either a part or the whole of the lessees' interest in the lease of December 22, 1948, by telling them he had a top lease over the December 22nd lease. (Finding 15, R. 466; R. 153, 154, 162, 163.)

3. In the last paragraph on page 3 of respondents' brief

it is stated that the engineer was not requested to apply for a bond or drilling permit by plaintiff.

The defendant, Ollie Husk, in his answer, pleaded Section 60-764, Burns' Supplement of the Indiana Statutes for 1933, which provides that "Before drilling or deepening any well for oil or gas, it shall be the duty of the person having custody or control of the land upon which the well is sought to be drilled or the person desiring to drill such well to apply to the Commission for a permit for the drilling of such well, furnish the bond required and pay the filing fee provided by the Act". (R. 75.) If the procurement of a permit and filing of a bond were required as a condition precedent to the drilling of such well, the primary duty to obtain the same rested upon Mr. Keck, and he would have had no right to declare a forfeiture against Muth without complying with said statute.

PETITIONER'S REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION TO GRANTING OF WRIT.

One.

Respondents in answer to Point One of the Petition for Writ of Certiorari say:

> "The Supreme Court will not consider, upon certiorari, any question not raised in the lower courts."

The first question presented upon the Master's Conclusions of Law and presented in the United States Court of Appeals for the Seventh Circuit and assigned as reversible error is stated in Plaintiff-Appellant's statement of points relied on for reversal, filed with the Clerk of the District Court, September 20, 1950, and found in the Record at page 503, as follows:

> "The court erred in deciding that the partnership existing between plaintiff-appellant, John J. Muth, and defendants-appellees, Arthur Oeth and Robert Oeth,

terminated upon the giving by Arthur Oeth of the written notice dated January 5, 1948, to cancel the partnership agreement, as final settlement has never been had between the partners as to the lease sued on herein. The court erred in treating the said partners and co-tenants as strangers dealing at arm's length in the subject matter of their written lease of December 22, 1947, sued on herein."

This was presented again to the court at page 35 of Appellant's Brief in Point One thereof as follows:

> "Defendant, Arthur Oeth, owed to his partner and co-tenant, plaintiff, John J. Muth, in the oil and gas lease of December 22, 1947, the duty of exercising good faith in dealing with the partnership property and this duty was not terminated by giving the thirty days' notice to cancel the partnership agreement.",

and citing four Indiana authorities, the first of which is *McKinley* v. *Long* (1949), 227 Ind. 639 (88 N. E. (2) 382), also cited in support of Point One of the reasons relied on in this Court at page 19 of the Petition for Writ of Certiorari.

In the argument in the United States Court of Appeals, Appellant's Brief at page 41, in stating the three fundamental errors, says:

> "The first of these errors is found in the Conclusion of Law, #2, that the partnership relation of the plaintiff, John J. Muth, and the defendant, Arthur Oeth, was terminated thirty days after January 5, 1948. This fundamental error leads to the erroneous conclusion that no duty was owing by Arthur Oeth or those who worked with him to obtain the third oil and gas lease on the 67.5 acres of Fred J. Keck, because of the alleged termination of the partnership itself. This error is heightened by the relation of co-tenants in the oil and gas lease of December 22, 1947. Either relation, in Indiana, requires the utmost good faith between the co-tenants, as well as partners, and this is doubly true when the co-tenants are also in the trust relation of partners in the business."

The brief then quotes the decision of the Supreme Court of Indiana in *McKinley* v. *Long* (1949), 227 Ind. 639 (88 N. E. (2) 382, 384), which is cited and relied on as the law of Indiana by decision as well as by the statute quoted in the first of the reasons relied on for allowance of the writ in this case.

The statute does not require interpretation. It simply repeats what has already been decided to be the law of Indiana, that the dissolution of a partnership in Indiana does not terminate the relation as to unfinished business. It is repeatedly urged that the decision in this case has denied the Plaintiff-Appellant, the petitioner herein, the rights granted him as a contracting partner under the laws of the State of Indiana. It is not a question of interpretation or of construction of the statute. The decision contravenes this fundamental principle of partnership law to the extent of excusing the partner who had a one-fourth interest in the partnership lease obtaining a top lease for all of the property, and then within a few days joining with third parties in an illegal contract to defend the respondent owner of the oil property, the defendant, Fred J. Keck, against any suit arising from either the partnership lease or the top lease to Arthur Oeth, himself.

The last urgent statement of the Indiana law that dissolution of the partnership does not terminate the fiduciary relation as to unfinished business is found at pages 12 to 15 of Appellant's Reply Brief in the Court of Appeals. Again it is the first point in the argument, presented as follows:

> "In declining to consider and attempting to avoid the vital errors presented on Appellant's Brief, defendants make those errors stand out in bold relief.
>
> "The first error with respect to the legal effect of facts expressly found and undisputed on the evidence is the glaring one concerning the partnership relation of plaintiff Muth and the defendants Oeth. Reference is made to Finding #8, R. p. 463. The fact therein

found, that settlement of the partnership affairs was in July, 1948, together with the patent fact that the most important partnership lease, the one now in suit, remained unsettled, effectually disposes of the alleged binding effect of the Conclusion of Law #2 that the partnership terminated thirty days after January 5th, 1948. All of the matters complained of in plaintiff's complaint occurred before July, 1948, and the partnership relation and that of co-tenants was present and existing together with the duties and obligations thereof throughout that period, with particular reference to the lease of the partners and co-tenants of date December 22, 1947."

Two.

The act of respondent lessor Keck in granting to the one partner, Arthur Oeth, the entire leasehold at a time when he would otherwise have been cooperating with his partner, appellant and petitioner Muth in validating the partnership lease is, as a matter of law, the greatest possible hindrance of the carrying-out of the drilling covenant. It was, moreover, the greatest inducement to the co-tenant Oeth to not perform the joint lease where he had only a one-fourth interest, when, by refusing to bring on the partnership drilling equipment, and holding off performance under the partnership lease, he would automatically have in his sole hands and ownership the entire leasehold. This act of the lessor, as a matter of law, combined with the extension of thirty to sixty days granted to the partner Oeth in which to commence drilling is the "inducement" which extended to one of the two partners and not only estopped lessor Keck to invoke the time limit in the drilling covenant of the partnership lease as against the innocent partner, but was also as a matter of law an express extension of the time to commence drilling the test well as to both partners.

No holding of any court in any case could more effectually

strike down the standard of good faith on the part of the lessor, required of the lessor under the Indiana decisions governing oil and gas leases. Nor is it to be doubted that the standard of conduct, "the duty of the finest loyalty" laid down by Justice Cardozo for joint adventurers in the case of *Meinhard* v. *Salmon* (1928), 249 N. Y. 58, and later cited in *Buffum* v. *Peter Barceloux Co.* (1932), 289 U. S. 237, and without exception, the law of the partnership relation in Indiana is completely shattered in this holding that, because one partner had decreed the dissolution of the partnership, that his sole duty owing to the petitioner was that he should not interfere with the performance of the joint covenants by his partner and co-tenant Muth. This is not the time-honored and inexorable law of the partnership relation anywhere or at any time in Indiana. This is the simple rule of conduct governing the right of any business man to carry out his contracts without any interference by any other person. It strips from the partnership relation the correlated duties of fiduciaries, even as to the subsisting covenants of a partnership leasehold in gas and oil, upon which its very preservation depended.

THREE.

The decision in *Preston* v. *Witherspoon* (1886), 109 Ind. 457, 464-465, relying on and quoting the decision of the Supreme Court of the United States in *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, is not so narrow as interpreted in respondents' answer. The Indiana case at page 465 holds:

> "The rule should be applied, that where one of two innocent persons must suffer by the wrong of a third person, he must be the sufferer who put it in the power of the wrong-doer to cause the loss."

The principle is that even though an instrument was not sufficient in itself to clothe the grantee with title, if it nevertheless enables him to harm any third person, cer-

tainly if it enables him to harm his own partner as in this case, the grantor cannot be heard to say that he did not intend the consequences of his act in placing the indicia of title to the entire leasehold in the hands of the defaulting partner Oeth. It is admitted on the evidence that the respondent Oeth held this top lease in his possession, stating to prospective investors with the petitioner Muth that he did have a sole lease to the entire premises and that the partnership lease in which he had only a one-fourth interest would soon expire by failure to drill, and thus dissuaded these investors from joining with the ousted partner Muth in commencing the drilling of a test well and thus fulfilling the partnership lease.

It was held out to be and used before the 23rd day of March, 1948, as a valid lease with the consent of lessor Keck and he stated that the indemnity agreement of March 27, 1948, covered both the partnership lease of December 22, 1947 and the top lease he gave Arthur Oeth early in March, 1948.

Probably never before in the history of litigation has such an act on the part of either lessees or lessors been treated as of no consequence and even the testimony of the prospective investors, Joe Vale and Edward Turner, treated as if mere hearsay, if admissible at all, instead of positive evidence, when that evidence directly established the use of the top lease to hinder and defraud the petitioner of his rights in the leasehold.

FOUR.

It is not to be imagined that respondent Oeth deliberately divested himself of all interest in this valuable leasehold by withholding the drilling rigs from the 67.5 acres unless he had been given and continued to hold the top lease to all of the premises. The act of the lessor in

executing this top lease to one of the partners was doubly damaging to the performance of the drilling clause in the partnership lease because: First, it directly induced Oeth to refuse to bring on the partnership drilling rigs, one of which was capable of drilling the well and either of which could have spudded in the well and validated the lease (Finding #7, R. p. 463), and; Second, because the top lease was used by Oeth with the full knowledge and consent of lessor Keck and represented as a valid and outstanding lease in himself and so exhibited to third parties to influence their decision. (Finding #12, R. p. 465.)

The resulting confusion of titles and intimidation of capital from investing in the development of the leasehold was the most serious possible interference with performance by one of the partners, the petitioner herein. (Finding #15, R. p. 465-466; R. p. 153 and 162.)

FIVE.

The fifth point is not in any manner met by saying that the court below found that respondent Oeth did not interfere with the performance of the partnership lease. Oeth was not an outsider who had the mere duty not to place obstructions in the way of some third party. He was not only bound by the contract with petitioner Muth to employ the drilling rigs in the performance of their mutual drilling covenants, but as a partner he was duty bound to do everything in his power to conserve and save the partnership assets. He was not only a co-tenant in the ownership of the property, but he was a co-promisor because the lease was both the grant of a right in an estate and a contract. As such partner and co-tenant and co-contractor he was bound by the laws of Indiana governing these relations to move the drilling rigs from his farm over to the Keck lease and validate and save the leasehold. It is of

profound moment that there can be no greater dereliction of duty under the three-fold relation of respondent Oeth, then to refuse to perform the drilling covenant.

The holding that the time limit of the drilling covenant is automatic condones the conduct of Oeth as a positive dereliction of duty owed both to his partner and to the lessor and was induced by the act of the lessor in giving him the entire leasehold and permitting him to actually claim title to the entire leasehold and warning prospective investors in order to make the automatic provision the death sentence to destroy the lease both as to himself and his partner Muth. If this is not wrongful interference and wrongful invasion of the legal rights of petitioner Muth, then conduct beneath that of the market place is the standard of honor applicable to partners and co-tenants and co-promisors in contracts of this character.

Six.

The holding again relied on in this appeal by respondents that neither lessor Keck nor lessee Oeth did anything to hinder or obstruct the performance of the first or partnership lease is peculiarly unfortunate because the execution of a top lease for gas and oil, even to a third person, has again and again been held to be notice that the prior lease is at an end and a direct obstruction to its performance by the lessee therein. Some of these cases are set out in the case of *Simons* v. *McDaniel* (1932), 154 Okla. 267. Where this top lease is given to a partner in the joint lease and a co-tenant therein the demoralization is complete and to declare otherwise opens wide the door to fraud and double dealing in this class of cases, and it must inevitably result in substituting the rule of force in protecting such property rights instead of the appeal to law.

The language and holding set out from the decision in the case of *Elkhart Carworks* v. *Ellis* (1887), 113 Ind. 215, is quoted and followed in a Texas oil case as follows, to-wit: *Hodges* v. *Miller* (1922), Tex. Civ. App. 244 S. W. 634, 635 (which as there correctly quoted we repeat to correct error in the quotation on page 23 of the Petition For Writ of Certiorari):—

> " 'If the grantor of an estate upon condition wrongfully prevents the performance of the condition he cannot regain the estate. This principle runs through all the law and is a principle of natural justice. 1 Sheppart, Touchstone (6th Ed.) 154. It would be a flagrant violation of a right to permit the grantor of an estate upon a condition subsequent to defeat the estate by wrongfully preventing the performance of the condition, and the law is not subject to the reproach of permitting such a thing to be done.' "

SEVEN.

It remains uncontradicted on this record that petitioner Muth would have been allowed to proceed with the performance of his lease commitments had not his partner, Oeth, and respondent Husk for the Johnston Drilling Company, Inc. agreed with lessor Keck to defend any actions growing out of the order to Muth to cease operations and quit the premises. And without this contract, both Keck and Husk testified the third lease sued on herein would never have been granted. This contract that resulted directly in depriving petitioner Muth of his valuable rights under the partnership lease was the act of his own co-partner and co-tenant in that very leasehold. Even as a co-promisor in the joint lease, Oeth could not legally or morally commit this wrong to his associate and when done by a co-tenant and partner to destroy the partnership estate, the agreement is against public policy and in every

right sense an immoral undertaking. It is by this decision the law of this jurisdiction that such a contract is perfectly proper and Mr. Keck is not only absolved from any liability for making it but congratulated and commended, while the man to whom he owed fair dealing and good faith is condemned as a mere adventurer.

It cannot be overlooked that under the same situation in some seven other partnership leases the rigs at a later date were moved in and the test well completed as per the same lease agreements as that with lessor Keck. (Finding #14, R. p. 421; Finding #15-17, R. p. 422; Exhibit Z-1, R. p. 458.) Yet Keck is here congratulated for shifting lessees to Johnston Drilling Company, Inc. who did not drill the wells on this property but gave a half interest in the lease to respondent Aetna Oil Company to drill at their own expense the first well, and from the joint income from oil, produced the remaining wells.

Petitioner Muth has been engaged actively in drilling for oil and gas in various states for many years (R. p. 166, 167) and had individually completed more than one hundred producing wells (R. p. 309, Finding #8), as well as probably one hundred other wells with other contractors. It is to be noted that he had the richest experience of any of the individuals in the case and it is probably a matter of judicial notice that Texas drillers are in demand the world over in oil fields because of their wide experience in drilling for gas and oil and in the difficult performance of these drilling contracts, petitioner not only was a most desirable partner, but was in this case doing everything in his power to carry out his contract. It is to be noted that the respondents themselves evoked from the witnesses, Joe Vale and Edward Turner (R. p. 156) and also E. A. Kemp (R. p. 291) that they were drilling oil wells with Mr. Muth at the very time this case was being tried and were

eager to have come in with him to develop the Keck lease. (R. p. 154 and 164.) He was ruthlessly deprived of it by the combination of the lessor Keck and his nephew Oeth in their effort to keep this valuable property entirely in the hands of the family. We are loathe to believe that this should become the standard of partnership rights or contract rights or of the granting to one co-tenant of the entire leasehold to the exclusion of another co-tenant within the jurisdiction of this court.

Eight.

The chief mining development in Indiana is in the production of coal. Oil has been produced since an early date and is now becoming of greater comparative importance. At no time has there ever been any distinction drawn in Indiana between partnerships engaged in either industry and partnerships generally. And it is now statutory that the trust principles of partnership law are applicable to every business, without exception, within the jurisdiction of the courts of Indiana. Section 50-402, Burns Indiana Statutes, Revised 1933 (1951 Repl.) expressly provides:

> "'Business' includes every trade, occupation or profession."

There is nowhere in the law of Indiana by decision or by statute any exception to the principle that partners are trustees, the one for the other and must deal with the partnership property in all respects bound by the fiduciary relation and the principles governing trust law. Again we call the attention of this honorable court to the fact that the principles governing the conduct of trustees are inexorable in their application. By this decision of the court of last resort in the Seventh CCA, the bars are thrown down even where the most important lease of an oil partnership remains wholly unperformed.

From January 5, 1948 until the petitioner moved his rig on the leased premises on March 22, 1948, the partnership lease which was both a contract and a conveyance remains subject to all of the inexorable rules of partnership law.

There is a further fundamental distinction the law of which has been torn up by the roots by this decision, and that is the law in Indiana governing co-tenancy. In many states unless the co-tenants were also partners the rule of fiduciary relation is relaxed. This has never been true in Indiana. There is, therefore, here a double infraction. The decision of the United States Court of Appeals for the Seventh Circuit has not only in this decision gone squarely in the teeth of the Indiana law governing partnerships, but has denied to this petitioner the protection of the law governing the rights of this petitioner as a co-tenant.

The answer brief states that this Point Eight is a mere repetition of what has gone before. Attention is now drawn to the fact that no attempt has been made to answer the real point raised on the eighth objection of this petitioner, and that is that there has been denied to this petitioner in a manner of law governing property rights, the equal protection of the law and it will never be righted unless righted by this honorable court of last resort. It is not in Indiana alone that this decision, applicable to a great industry, has been so asserted. This decision will be a ruling precedent throughout the entire circuit, as much as in Illinois, an oil producing state, as in Indiana.

It is respectfully submitted that certiorari should be granted and this judgment and the decision in all things should be reversed.

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